THE STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

The State of New Hampshire

v.

Smoke Signals Pipe & Tobacco Shop. LLC

Docket No.: 03-S-317-I – 03-S-324-I & 03-S-328-I

ORDER ON PENDING MOTIONS

Smoke Signals Pipe & Tobacco Shop, LLC ("the defendant") is charged with eight counts of selling drug paraphernalia in violation of RSA 318-B:2. The defendant filed the following motions in May, 2003, to which the State objects: Motion to Dismiss, Motion to Dismiss II, Motion to Quash and/or alternatively Motion for Bills of Particulars, Motion to Suppress, Motion to Elect One (1) Single Count and/or Motion to Consolidate Various Counts into One (1) Charged Offense. Co-defendant Susan Hargrove, an agent of the defendant charged with three counts of selling drug paraphernalia, joins in the defendant's motions. Additionally, co-defendant Eric Marshall, an agent of the defendant charged with one count of selling drug paraphernalia, joins in the defendant's motions and independently moves to dismiss the charge against him. The State objects. Following a July 21, 2003 hearing on these matters, and upon review of the parties' arguments and the relevant law, the court finds and rules as follows.

Motion to Dismiss

On October 19, 2001, after the Dover Police Department conducted an investigation of the defendant's business, officers of the New Hampshire Drug Task Force executed a search warrant at the defendant's premises. Arraignment took place on November 9, 2001 in the Dover District Court. Trial was originally scheduled for April, 2002. In February, 2002, however, the Strafford County Attorney's Officer filed a motion to accept jurisdiction and consolidate with the Strafford County Superior Court. The motion was granted and arraignment at the superior court was scheduled for July 8, 2002. In the meantime, the State nol prossed the complaints in the Dover District Court.

On October 28, 2002, the superior court held a hearing on the defendant's motion to suppress and motion to quash. On November 13, 2002, the court (Houran, J.) granted the motion to quash. The State moved the court to reconsider its November 13th order, but on January 6, 2003 the court denied the State's motion as untimely. The State received notice of the January 6th denial of its motion to reconsider on March 11, 2003. On March 13, 2003, the State filed a motion to toll proceedings in the superior court so it could consider whether to appeal the November 13th order to the New Hampshire Supreme Court. Rather than pursuing an appeal, however, the State drafted the informations that are currently pending shortly thereafter.

Citing both the state and federal constitutions, the defendant argues the State has violated its right to a speedy trial by delaying trial for approximately two years from the date it was originally charged with selling drug paraphernalia. Because the New Hampshire Constitution provides at least as much protection as the United States Constitution

provides in this area, see State v. Langone, 127 N.H. 49, 51-52 (1985), the court addresses the defendant's claims under the New Hampshire Constitution, referring to federal authority only to assist in its analysis. See State v. Ball, 124 N.H. 226, 232 (1983).

In considering whether a defendant's right to a speedy trial has been denied, the court must consider four factors. See State v. Adams, 133 N.H. 818, 824 (1991). "These factors are: (1) length of delay; (2) reasons for the delay; (3) defendant's assertion of his speedy trial rights; and (4) prejudice to the defendant." Id. (citing Barker v. Wingo, 407 U.S. 514, 530-33 (1972)). No one factor is dispositive; "[r]ather, they are related factors and must be considered together with such other circumstances as may be relevant." Barker, 407 U.S. at 533.

According to the defendant, all four Barker factors weigh in its favor. Specifically, the defendant asserts the delay is attributable to the State, the State has no legitimate reason for the delay, the defendant need not have asserted its right to a speedy trial to justify dismissal on the basis of the State's delay and the defendant has been prejudiced by the delay in that its ability to conduct business has suffered.

The State counters that because the delay in this case was caused by "normal court procedure" and pleadings filed by the defendant, the State did not cause the delay. The State further contends that because the defendant need not have asserted its right to a speedy trial to justify dismissal on the basis of the delay, the court should not consider that factor in determining whether the case should be dismissed. Finally, according to the State, the type of prejudice the defendant claims to suffer as a result of the delay is not the type of prejudice the right to a speedy trial is designed to guard against. The court agrees with the State.

The length of the delay, the first Barker factor, weighs in favor of the defendant. Specifically, where, as here, the delay exceeds nine months, the delay is presumptively prejudicial. State v. Fletcher, 135 N.H. 605, 607 (1992); see also Langone, 127 N.H. at 54 (ten-month delay in misdemeanor case presumptively prejudicial); Superior Court Speedy Trial Policy, App. to Sup. Ct. R. (misdemeanor cases pending six months without disposition shall be scheduled for show cause hearing on potential dismissal under Barker). The presumptively prejudicial delay in this case triggers the court's consideration of the remaining three factors. Fletcher, 135 N.H. at 607.

"In considering the second Barker factor, the reason for the delay, [the court] initially discount[s] for any delays which were prompted by the defendant . . . [because] [i]t is elementary that the defendant cannot take advantage of delay that he has occasioned." Id. (citations omitted). Here, the defendant filed a motion to dismiss and a motion to quash shortly after the case was transferred to the superior court. Moreover, since the State drafted new informations, the defendant has filed the five motions that form the basis of this order. Thus, part of the reason for the delay in bringing this case to trial is attributable to the defendant.

The defendant argues that the State waited four months from the date the prior charging documents were quashed to draft the currently pending informations and implies that delay was caused by the State. In this case, the court granted the defendant's motion to quash on November 13, 2002 and denied the State's motion to reconsider that order on January 6, 2003. The State, however, did not receive notice of the court's January 6th order until March 11, 2003. Two days later, the State filed a motion to toll and before the month's end, the State drafted new informations. The court finds, on these facts, that the four-month delay of which the defendant complains was not caused solely by the State.

Indeed, the State can only be said to have caused a delay of less than two weeks by filing its motion for reconsideration approximately eleven days after the 10-day deadline for filing such motions. See Super. Ct. R. 59-A (1). The remainder of the delay is attributable to the court, rather than the state. Therefore, the court finds the second factor of the Barker test weighs against the defendant. Cf. Barker, 407 U.S. at 531 (overcrowded courts, although factor to consider, should be afforded less weight than deliberate attempt by State to delay trial).

The New Hampshire Supreme Court has directed courts in this state to place "substantial emphasis on the latter two of the Barker factors." Langone, 127 N.H. at 55 (citation omitted). However, it is only "[a]bsent a rule or statute setting time limits [that] a defendant has a responsibility to assert his right to a speedy trial." State v. Weitzman, 121 N.H. 83, 86 (1981) (citation omitted). See also Barker, 407 U.S. at 528-29 (assertion of right to speedy trial one factor to consider in circumstances of case, including applicable formal procedural rule). Under the Superior Court Speedy Trial policy, trial courts are to hold show cause hearings for the State to demonstrate why misdemeanor charges should not be dismissed when the case has been pending for six months without disposition. Assuming the foregoing policy is a rule setting time limits under Wietzman, the defendant need not have asserted its right to a speedy trial.

The fourth factor "is prejudice to the defendant." Barker, 407 U.S. at 532. "Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect." Id. Those interests are "to minimize the anxiety and concern of the accused . . . [and] to limit the possibility that the defense will be impaired." State v. Cole, 118 N.H. 829, 831 (1978) (citing Barker, 407 U.S. at 532)

(brackets and quotations omitted). Another interest the speedy trial right was designed to protect is "to prevent oppressive pretrial incarceration[.]" Barker, 407 U.S. at 532.

Here, the defendant asserts it has been prejudiced by the State's delay because it has not replaced inventory the State confiscated as evidence for fear the new inventory would also be confiscated, and therefore its "ability to transact business has been significantly impacted." (Def. Mot. to Dismiss at ¶ 7.) The defendant further argues it has been prejudiced by the delay because it has "incurred the expense of repeated prosecutions." (Id.)

Although the effects of the delay on the defendant are not insignificant, the court finds the defendant has nonetheless failed to articulate prejudice in terms of the interests the speedy trial right is designed to protect. Clearly, the defendant, a corporation, has not been subject to pre-trial incarceration. Moreover, the defendant has not claimed its defense has in any way been impaired by the delay. Finally, while the defendant's assertions relative to the conduct of its business could cause the principal(s) of the company anxiety and concern, the court finds the fourth factor nevertheless does not weigh in favor of the defendant. Simply put, based on the defendant's assertions, whatever anxiety and concern has resulted from the delay in this case does not rise to a level that justifies dismissal of the charges.

In sum, even assuming the court is required to consider the third Barker factor, the court finds that the facts and circumstances of this case as applied to the Barker factors weigh more heavily in favor of the State than the defendant. Accordingly, the defendant's Motion to Dismiss is **DENIED.**

Motion to Dismiss II

In its second motion to dismiss, the defendant maintains the State is abusing its prosecutorial discretion by overcharging, and on that basis asserts the charges should be dismissed. Specifically, the defendant argues the State charged it with eight informations involving the sales of inventory rather than aggregating the charges and prosecuting the defendant for one common scheme. The defendant further contends the charges should be dismissed because the State brought new, more serious charges against the defendant after it asserted its right to a speedy trial and joined co-defendant Susan Hargrove's motion to suppress filed in the Dover District Court. Finally, incorporating its arguments from its Motion to Dismiss I, the defendant argues the charges against it should be dismissed for lack of speedy trial.

Relying on State v. Bergeron, 115 N.H. 70 (1975), the State counters that it has not engaged in overcharging. According to the State, because there is no threat of confusion or harassment of the defendant by bringing eight specific charges based on four separate incidents, and because the defendant is fully aware of and informed of all pending charges, the State has complied with the directives of Bergeron. The State further asserts it did not engage in prosecutorial vindictiveness by nol prossing the charges against the defendant in the Dover District Court and bringing new charges against it in this court. The State contends it nol prossed the case in the Dover District Court and commenced new proceedings against the defendant in this court because the district court lacked jurisdiction over some of the defendants. Moreover, according to the State, Judge Nadeau already considered the defendant's claim of prosecutorial vindictiveness when she considered whether the State's motion to transfer to the superior court should be granted.

The State asserts Judge Nadeau found no prosecutorial vindictiveness and the defendant's attempt to relitigate the issue should be disregarded.

As a threshold matter, based on the reasoning set forth above relative to the defendant's Motion to Dismiss I, the court finds no violation of the defendant's right to a speedy trial. Therefore, the court declines to dismiss the charges on that basis.

As for the defendant's remaining arguments, the court finds they too fail to set forth grounds for dismissal. "Due to the necessarily fragmentary nature of the evidence before him at the charging stage, the prosecutor must have broad discretion in drawing the charges." Bergeron, 115 N.H. at 72. "The trial court may, however, curb the prosecution's broad discretion if overcharging poses dangers of confusion, harassment, or other unfair prejudice." State v. Rayes, 142 N.H. 496, 500 (1997) (quotations and citation omitted).

A brief recitation of the charges in this case demonstrates that there is no danger of confusion, harassment or other unfair prejudice to the defendant. In docket number 03-S-317-I, the defendant is charged with selling, through its agent, a "glass pipe shaped like a handgun for $24.99" to an officer of the New Hampshire Drug Task Force ("the task force") on October 4, 2001. In docket number 03-S-318-I, the defendant is charged with selling, through its agent, a "hand-blown glass bowl for $29.99" to an officer of the task force on October 4, 2001. In docket number 03-S-319-I, the defendant is charged with selling, through its agent, "a pipe disguised inside a green hi-liter for $14.99" to an officer of the task force on October 2, 2001. Docket number 03-S-320-I charges the defendant with selling, through its agent, a "plastic bong approximately two feet tall for $36.99" to an officer of the task force on October 12, 2001. Docket number 03-S-321-I charges the defendant with offering for retail sale "drug paraphernalia, specifically a quantity of glass pipes . . ." and docket number 03-S-322-I charges the defendant with offering for retail sale

"drug paraphernalia, specifically a quantity of plastic bongs, also known as water pipes . . ." Similarly, docket numbers 03-S-323-I and 03-S-324-I charge the defendant with offering for retail sale "drug paraphernalia, specifically a quantity of glass bongs, also known as water pipes . . ." and "drug paraphernalia, specifically a quantity of chillums, also known as one-hitters . . . ," respectively.

The court finds the foregoing charges are not confusing, harassing or otherwise prejudicial to the defendant. The charges are all based on either separate transactions or specific merchandise the defendant offers for retail sale. In other words, each of the eight informations is "sufficiently specific to inform the defendant of what [it] [has] to be prepared to meet at trial." Bergeron, 115 N.H. 72 (citations omitted).

Furthermore, Judge Nadeau previously found the above-captioned cases were properly transferred to the superior court over the defendant's objection based on its assertion of prosecutorial vindictiveness. Thus, the issue of whether the charges in this case are inappropriate has already been decided.

Accordingly, the defendant's Motion to Dismiss II is **DENIED**.

Motion to Quash and/or Alternatively Motion for Bills of Particulars

The defendant asserts the informations in docket numbers 03-S-321-I through 03-S-324-I should be quashed or, in the alternative, that the State should have to file bills of particulars relative to those charges, because the informations do not allege any facts to support the individual element of knowledge and are therefore legally insufficient. According to the defendant, the State must set forth in the informations, with specificity, how or why the defendant or its agents knew the various items alleged to be drug paraphernalia were to be used or intended to be used by the purchaser in any of the twenty-five ways prohibited by RSA 318-B:1, X-a. To that end, the defendant maintains

that should the State opt to draft bills of particulars to avoid an order quashing the informations, the State must place the defendant on specific notice regarding how the State alleges the defendant knew or had knowledge that a purchaser intended to use a specific retail item for any of the designated prohibitions in RSA 318-B:1, X-a.

The State argues first that the defendant's motion is procedurally inappropriate because, unlike indictments, informations can be amended at any time. Therefore, according to the State, the court can amend the informations if it finds they are insufficient and need not issue an order quashing the informations or directing the State to file bills of particulars. Second, the State contends that in the context of this case, namely, where the charges against the defendant corporation stem from the alleged acts of its agents, the issue of the defendant's knowledge is a fact-intensive matter for resolution at trial, not in pre-trial motions to quash. Third, relying on Posters 'N' Things v. United States, 511 U.S. 513 (1994), the State maintains that the defendant had only to be aware of the character of the items sold, not the particular use to which the purchasers intended to or did put the items. Finally, the State asserts bills of particulars are not needed in this case because the informations adequately inform the defendant of the specifics of the charges against it.

Part I, Article 15 of the New Hampshire Constitution provides that "[n]o subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him[.]" The New Hampshire Supreme Court has stated that to determine whether a formal charging document meets the requirements of Part I, Article 15,

> [t]he true test is not whether the indictment[1] could possibly be made more definite and certain but rather whether it alleges every element of the offense charged in language sufficiently definite to apprise the respondents of what

[1] The standard for charging documents applies to both indictments and informations. See generally 1 R. McNamara, New Hampshire Practice, Criminal Practice and Procedure, §369-70 at 347-56 (1997 & Supp. 2002).

> they must be prepared to meet for trial. It also stands to reason that the circumstances surrounding the particular offense may of necessity affect the degree of definiteness which can reasonably be required of the State in its indictment.

State v. Settle, 132 N.H. 626, 631 (1990) (citation omitted).

RSA 318-B:2, II-a provides that "[i]t shall be unlawful for any person, at retail, to sell or offer for sale any drug paraphernalia listed in RSA 318-B:1, X-a." (Supp. 2002). Under RSA 318-B:1, X-a, drug paraphernalia is defined, in pertinent part, as

> all equipment, products and materials of any kind which are used or intended for use or customarily intended for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter. It includes, but is not limited to:
> . . . .
> (k) Objects used or intended for use or customarily intended for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, or hashish oil into the human body, such as:
> (1) Metal, wooden, acrylic, glass, stone, plastic or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;
> (2) Water pipes;
> (3) Carburetion tubes and devices;
> (4) Smoking and carburetion masks;
> (5) Chamber pipes;
> (6) Carburetor pipes;
> (7) Electric pipes;
> (8) Air-driven pipes;
> (9) Chillums;
> (10) Bongs;
> (11) Ice pipes or chillers[.]

(Supp. 2002).

The New Hampshire Supreme Court has stated that "the only permissible" interpretation of RSA 318-B:1, X-a, which defines drug paraphernalia, is that the term "intended for use" applies to the accused. Opinion of the Justices, 121 N.H. 542, 545 (1981). That way, because "the knowledge or criminal intent of the person in control of an

object [is] a key element[,]" courts can ensure that "innocently possessed objects are not classified as drug paraphernalia." Id. (quoting and adopting comments to Model Drug Paraphernalia Act). The defendant relies on Opinion of the Justices in arguing the informations in this case do not allege any facts to support the individual element of knowledge and are therefore legally insufficient. As a threshold matter, the court first determines the nature of the element of knowledge applicable in this particular case.

In Posters 'N' Things, the United States Supreme Court granted certiorari to address a conflict among courts of appeals regarding the scienter requirement of former 21 U.S.C. §857. 511 U.S. at 516. The Court began its analysis by noting that although section 857(a), which described prohibited acts, did not contain an "express scienter requirement," various courts had discovered a scienter requirement in the statute's definitional provision. Specifically, certain courts had located a scienter requirement in section 857(d), which defined "drug paraphernalia" as "any equipment, product, or material of any kind which is primarily intended or designed for use" with prohibited drugs. Id. at 517. The Court disagreed with the defendant's contention that section 857(d) established a subjective-intent requirement on behalf of an accused, and adopted the Government's position "that [section] 857(d) establishes objective standards for determining what constitutes drug paraphernalia." Id. at 518.

The Court found that section 857(d) defined two categories of drug paraphernalia: objects "primarily intended . . . for use" with controlled substances and objects "designed for use" with controlled substances. Id. With respect to the latter category, the Court reasoned that

> [t]he object characteristics of some items establish that they are designed specifically for use with controlled substances. Such items, including bongs, cocaine freebase kits, and certain kinds of pipes, have no other use besides contrived ones (such as the use of a bong as a flower vase). Items that

> meet the "designed for use" standard constitute drug paraphernalia irrespective of the knowledge or intent of one who sells or transports them.

Id. (citations omitted). As for the first category, the Court concluded that although "primarily intended . . . for use" posed a more difficult problem in terms of identifying whether the definition was objective or subjective, "primarily intended . . . for use" refers to "a product's likely use rather than . . . the defendant's state of mind." Id. at 519.

The Court nevertheless went on to discuss whether, despite the objective standard in the statute for determining what constitutes drug paraphernalia, Congress intended to "dispense entirely with a scienter requirement." Id. at 522. The Court concluded that section 857 "is properly construed as containing a scienter requirement," and more specifically, that "a defendant must act knowingly in order to be liable under [section] 857." Id. at 523.

The Court, however, limited its conclusion with respect to the scienter requirement by stating, "we do not think that the knowledge standard in this context requires knowledge on the defendant's part that a particular customer actually will use an item of drug paraphernalia with illegal drugs." Id. at 524. According to the Court,

> [i]t is sufficient that the defendant be aware that customers in general are likely to use the merchandise with drugs. Therefore, the Government must establish that the defendant knew that the items at issue are likely to be used with illegal drugs. . . . Finally, although the Government must establish that the defendant knew that the items at issue are likely to be used with illegal drugs, it need not prove specific knowledge that the items are "drug paraphernalia" within the meaning of the statute. . . . [I]t is sufficient for the Government to show that the defendant "knew the character and nature of the materials" with which he dealt.

Id. at 524 (citations omitted).

In this case, the defendant is the seller of items alleged to be drug paraphernalia. In keeping with the United States Supreme Court's analysis in Posters 'N' Things, this court construes RSA 318-B, which, like section 857 does not contain an express scienter

requirement, as requiring knowledge on the part of an accused seller that "customers in general are likely to use the merchandise with drugs." Id. The statute is certainly susceptible of such a reading, because in addition to defining drug paraphernalia as various items "used or intended for use" in, among other things, inhaling or ingesting controlled substances, the legislature has defined drug paraphernalia as items which are "customarily intended" for such use. RSA 318-B:1, X-a (Supp. 2002). The term "customarily intended" indicates a seller, to be held criminally liable under the statute, must know customers are likely to use the merchandise in connection with illegal drug use.

Further, construing the statute in this manner is not inconsistent with Opinion of the Justices, in which the New Hampshire Supreme Court addressed only the general question of whether RSA 318-B:1 is unconstitutionally vague. See 121 N.H. at 544-45. In Opinion of the Justices, the Court did not state whether it considered the accused to be, for instance, a purchaser of alleged drug paraphernalia or a seller of such items. Thus, Opinion of the Justices could be read as requiring the State to prove either that a purchaser of alleged drug paraphernalia made the purchase knowing the item could be used for ingesting illegal drugs and intending it to be so used, or that a seller of alleged drug paraphernalia knew customers, in general, would be likely to use the objects with illegal drugs based on the seller's knowledge of the "character and nature of the materials" he offered for retail sale. Posters 'N' Things, 511 U.S. at 525.

The challenged informations in this case charge the defendant with offering for retail sale various items alleged to be drug paraphernalia in that they are "used, intended to be used or customarily intended for use, in ingesting, inhaling or otherwise introducing marijuana, cocaine or hashish into the human body[.]" (Docket nos. 03-S-321 - 324-I.) "An indictment is generally sufficient it is recites the language of the relevant statute:

typically it need not specify the means by which the crime was accomplished, or other facts that are not essential elements of the crime." State v. Chick, 141 N.H. 503, 506 (1996) (citation omitted). Here, by reciting the language of the relevant statute, namely, "customarily intended for use," the State has incorporated into the informations both the requirement of knowledge and the nature of the knowledge the State must prove at trial, specifically, that the defendant seller knew that customers in general were purchasing the items offered for retail sale for likely use in connection with illegal drugs. Therefore, the court will not quash the informations in docket numbers 03-S-321-I through 03-S-324-I.

"A bill of particulars is, in this State, a tool for clarifying an inadequate indictment or complaint, rather than a general discovery device." Id. Thus, "[t]he State is not required to provide a bill of particulars except when necessary for the preparation of a defense or to preclude a later unconstitutional prosecution." Id. at 507 (citation omitted). Because the court finds the informations in docket numbers 03-S-321-I through 03-S-324-I satisfy constitutional standards and provide sufficient information from which the defendant may prepare a competent defense, the court will not order the State to provide bills of particulars.

Accordingly, the defendant's Motion to Quash/Motion for Bills of Particulars is **DENIED**.

Motion to Suppress

The defendant moves to suppress all evidence officers of the New Hampshire Drug Task Force seized during a search of its premises on October 19, 2001. According to the defendant, the search warrant application and supporting affidavit are deficient because the affidavit fails to demonstrate that the defendant knew of any illegal uses to which its merchandise may be put and the warrant application fails to describe with particularity the

items sought. Based on the foregoing, the defendant maintains the warrant application in this case fails to establish probable cause to justify the search and sweeps unnecessarily broad, thereby invading protected freedoms. Consequently, the defendant argues all evidence obtained as a result of the search should be suppressed.

The State counters that the warrant application establishes probable cause. In particular, the State argues the affidavit is filled with references to the defendant's knowledge of the illegal use to which its merchandise would be put. Moreover, according to the State, the attachment to the warrant application tracks the language of RSA 318-B relative to "drug paraphernalia" and therefore describes with sufficient particularity the items sought. The court agrees with the State.

Under Part I, Article 19 of the New Hampshire Constitution,[2]

> [e]very subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. Therefore, all warrants to search suspected places, or arrest a person for examination or trial in prosecutions for criminal matters, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order, in a warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued; but in cases, and with the formalities, prescribed by law.

The New Hampshire Supreme Court has interpreted the term "cause or foundation" in Part I, Article 19 as "a requirement for probable cause." State v. Decoteau, 137 N.H. 106, 111 (1993) (citation omitted).

> Probable cause to search exists if a person of ordinary caution would be justified in believing that what is sought will be found in the place to be searched . . . and that what is sought, if not contraband or fruits or implements of a crime, will aid in a particular apprehension or conviction.

[2] Because Part I, Article 19 provides at least as much protection to an accused as the United States Constitution, the court addresses the defendant's claims under the state constitution and refers to federal law only to assist in the analysis. State v. Decoteau, 137 N.H. 106, 110-11 (1993); see Ball, 124 N.H. at 232.

Id. (quotations and citations omitted). To that end, to obtain a search warrant, "police must demonstrate, at the time they apply for the warrant, there exists a substantial likelihood of finding the items sought; they need not establish with certainty, or even beyond a reasonable doubt, that the search will lead to the desired result." Id. (citation omitted).

Here, the court finds the warrant application and supporting affidavit establish probable cause. Assuming, arguendo, the warrant application must establish some sort of knowledge on the defendant's behalf regarding the potential uses to which customers may put its merchandise to be valid, the application in this case has done so. Specifically, the affidavit refers to the presence of multiple signs in the store warning that if any patrons make reference to illegal substances they will be asked to leave. Certainly these signs indicate the defendant is aware that a potential, if not customary, use of the merchandise within the store is for ingesting illegal substances.

Moreover, the affiant states that one of the defendant's agents showed an undercover detective a hi-liter pipe, making sure to explain to the detective that the smoking pipe at one end of the marker can be concealed. The agent's explanation can surely be said to indicate knowledge on the defendant's behalf that customers may use the item for illegal purposes, otherwise there would be little to no value in being able to conceal the smoking pipe. Additionally, the affiant's discussion of her research on "Klear" detoxifier, which she purchased from the defendant's agent, indicates it is used to assist drug-users in passing urine tests.

Furthermore, the affiant discusses at length her conversations with individuals who had prior experience in law enforcement. Those individuals, as well as others with whom they had spoken, concluded that the items offered for retail sale in the defendant's business are items associated with the use of illegal drugs. Finally, the affidavit

establishes that although there are items relating exclusively to tobacco use offered for retail sale in the defendant's business, the majority of the defendant's inventory is items commonly associated with the use of illegal drugs.

"Reviewing courts should pay great deference to a magistrate's determination of probable cause and should not invalidate a warrant by interpreting the evidence submitted in a hyper technical sense." Decoteau, 137 N.H. at 111 (quotations and citation omitted). Indeed, "the evidence submitted in support of a warrant [should be interpreted] in a commonsense manner, giving due consideration to the preference to be accorded warrants." Id. (citation omitted). Keeping the foregoing standard in mind, the court finds the warrant in this case was properly issued because probable cause existed to believe the items sought, namely, drug paraphernalia, would be located in the defendant's business.

As for the particularity requirement in Part I, Article 19 relative to search warrants, the court finds this requirement is also met in the instant case. The affiant listed the items sought, in relevant part, as follows:

> [a]ll equipment, products, materials of any kind, objects used or intended for use or customarily intended for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as: metal, wooden, acrylic, glass, stone, plastic or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls, water pipes, carburetion tubes and devices, smoking and carburetion masks, chamber pipes, carburetor pipes, electric pipes, air-driven pipes, chillums, bongs, ice pipes, and chillers[.]

(Disc. at 29.) This list tracks the language of RSA 318-B:1, X-a, which defines "drug paraphernalia," the relevant portions of which have been set forth earlier in this order.

The defendant does not offer, nor is the court aware of, any authority for the defendant's contention that tracking the language of a statute to identify items sought in a search warrant application is insufficient under the particularity requirement of Part I,

Article 19. As the New Hampshire Supreme Court has stated, "[t]he degree of specificity required in a search warrant depends upon the nature of the items to be seized." State v. Kirsch, 139 N.H. 647, 652 (1995) (citations omitted). Here, the court finds the warrant "did not purport to authorize a general exploratory search, against which the particularity requirement is a safeguard[.]" Id. (citation omitted). Rather, the warrant was "tailored towards the seizure" of items related to the use of illegal drugs, and "[t]he practical impossibility of further specificity is apparent." Id. The court finds the affiant's use of the language of RSA 318-B:1, X-a in listing the items sought did not render the warrant unnecessarily broad.

Accordingly, the defendant's Motion to Suppress is **DENIED**.

Motion to Elect One (1) Single Count and/or Motion to Consolidate Various Counts into One (1) Charged Offense

Citing the double jeopardy provisions of both the state and federal constitutions, the defendant asserts the State should be required to either elect to proceed on one of the eight counts it has brought against the defendant or, in the alternative, consolidate the eight charges into one single charged offense because the elements comprising each separate information are identical. The defendant further asserts the plain language of the statue does not permit separate prosecutions for each individual item alleged to be drug paraphernalia. Finally, the defendant contends that allowing multiple prosecutions in this case would affirm a mistaken assumption that the statute creates multiple, separate offenses rather than a single crime that can be committed through multiple means. It is the defendant's position that if it violated the law, it did so through a continuous course of conduct and therefore the State should only have charged it with one single crime.

The State disagrees, asserting that the charges in this case do not violate the defendant's right to be free from double jeopardy because the defendant is not being charged with the same offense multiple times. According to the State, it is charging the defendant with eight separate offenses arising from four specific acts. The State argues the charged offenses in this case are inherently different because they require different proof, in that each alleged offense involves separate and unique items as well as different degrees of intent to sell. The State further contends that if the legislature intended to consolidate all charges stemming from sales or offerings for sale by one individual, it would have worded the statute accordingly. Finally, the State maintains that absent any allegations of wrongdoing on its part, the defendant does not, as it is attempting to here, have the authority to tell the State how to charge its case.

"Double jeopardy only prohibits reprosecution where the second offense charged is the same as the first, both in law and in fact." State v. Heinz, 119 N.H. 717, 720 (1979) (citation omitted). The court uses the "same evidence" test to determine whether the offenses are the same in fact: "Two offenses are considered separate in fact if different evidence is required to sustain each one." Id. at 721 (citation omitted). In other words, "[m]ultiple indictments are permissible only if 'proof of the elements of the crimes as charged will in actuality require a difference in evidence.'" State v. Stratton, 132 N.H. 451, 454 (1989) (emphasis in original) (citations omitted); see also State v. McKean, 147 N.H. 198, 200 (2001). This is so because

> the protection afforded by the [D]ouble [J]eopardy clauses of the [F]ifth [A]mendment to the United States Constitution and by [P]art I, [A]rticle 16 of the New Hampshire Constitution does not prevent the threat of twice being punished for the same act, but rather, forbids twice being tried and convicted for the same offense.

State v. Gosselin, 117 N.H. 115, 118 (1977) (citations omitted).

In this case, the defendant is not being charged multiple times for the same offense. Rather, as the State correctly asserts, the defendant is being subjected to multiple prosecutions for eight separate offenses arising out of several acts, namely, selling and offering for sale various items alleged to be drug paraphernalia. Thus, the defendant's right to be free from double jeopardy is not violated by allowing the State to proceed with the eight informations in this case.

Moreover, different evidence is required to sustain each information in this case. Specifically, the informations involve separate and distinct items, such as a glass pipe, a glass bowl, a plastic bong and chillums. Additionally, with respect to certain items, the State has alleged that its agent knowingly sold the items to an undercover officer on a certain date. With respect to other items, the State has alleged the defendant knowingly offered the items for retail sale on a certain date. Thus, the court finds the informations in this case satisfy New Hampshire's "same evidence" test.

Furthermore, the court does not agree with the defendant that the pertinent statute does not permit multiple charges such as the informations in this case. Notably, the defendant has not pointed to any specific language, or lack thereof, in the statute that would compel this court to agree with it on this issue. RSA 318-B:2, II-a provides that "[i]t shall be unlawful for any person, at retail, to sell or offer for sale any drug paraphernalia listed in RSA 318-B:1, X-a." (Supp. 2002). If the legislature intended to consolidate all sales or offerings for sale by one individual and prevent the State from prosecuting informations such as those at issue in this case, it could have done so. There is not, however, any limiting language in RSA 318-B:2, II-a, and the language the legislature chose to use is clearly susceptible to a reading that permits multiple prosecutions for the sale or offering for sale of multiple, distinct items.

As to the defendant's argument that allowing multiple prosecutions in this case affirms a mistaken assumption that the statute creates several separate offenses rather than one offense that may be accomplished through multiple means, the court again disagrees. As stated above, there is no language in or omitted from the statute indicating it does not create several separate offenses. To be sure, the wording of the statute would permit the State to prosecute an individual once for offering for sale multiple items alleged to be drug paraphernalia. In so permitting, however, the language of the statute does not prohibit charges such as the ones the State has brought here.

Accordingly, the defendant's motion is **DENIED**.

Motion to Dismiss

Co-defendant Eric Marshall moves to dismiss the charge against him, asserting the charge "is the product of a fundamentally unfair adjudicatory procedure" under Part I, Article 15 of the New Hampshire Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. According to the co-defendant, after the court (Houran, J.) granted the defendants' motion to quash on November 13, 2002, the State lost its ability to appeal that order and therefore, in an attempt to regain its ability to appeal the order quashing the original informations, charged the defendants with informations identical to the originals. The defendant maintains the State's actions in this case are analogous to the State nol prossing a case to gain a tactical advantage over the accused.

The State counters that it did not, as the co-defendant alleges, simply re-file the same informations after the original informations were quashed. According to the State, it incorporated into the new informations the allegations called for in Judge Houran's order granting the defendants' motion to quash the original informations. The State further

contends that it is the only party prejudiced by the procedural history of this case because, due to the unexplained delay in forwarding notice of Judge Houran's order denying reconsideration of its order quashing the original informations, it lost its ability to appeal the issue to the New Hampshire Supreme Court.

As a threshold matter, the court notes that the newly drafted information relative to the co-defendant is not identical to the originally filed information. Specifically, in the original information, the State alleged that the co-defendant

> did knowingly, at retail, sell drug paraphernalia, in that Eric A. Marshall did sell to an officer of the New Hampshire Drug Task Force a pipe disguised inside a green hi-liter, for $14.99, such plastic pipe being an object customarily intended for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, or hashish into the human body.

(Docket No. 02-S-192-I.) In the newly filed information, the State alleges that the co-defendant

> did knowingly, at retail, sell drug paraphernalia, in that Eric A. Marshall did sell to an officer of the New Hampshire Drug Task Force a pipe disguised as a hi-liter, for $14.99, such plastic pipe being an object used, intended to be used or customarily intended for use, in ingesting, inhaling, or otherwise introducing marijuana, cocaine, or hashish into the human body.

(Docket No. 03-S-328-I) (emphasis added).

The State added the emphasized language to the original information to comport with Judge Houran's order quashing the original informations on the basis that they lacked "reference to the specific intent required by the statute . . . ." (Docket No. 02-S-181-I, Doc. 27, Order at 5.) In quashing the original informations, Judge Houran did not consider Posters 'N' Things. In fact, it wasn't until the State filed its motion to reconsider that Posters 'N' Things was even brought to Judge Houran's attention. Specifically, in moving Judge Houran to reconsider his November 13th order, the State argued that "[l]egal authority, both from case law and statute, was overlooked by both the State and the Court

in deciding this matter. Thus, though the State should have brought this authority to the Court's attention at the time of the original hearing, it would serve the interests of judicial economy for the Court to reconsider its Order based upon this new authority." (Id. at Doc. 29, State's Mot. to Recons.) Judge Houran, however, denied the State's motion to reconsider as untimely under Superior Court Rule 59-A, and did not consider the merits of the State's discussion of Posters 'N' Things. (See id. at Doc. 35, Order.)

Upon consideration of Posters 'N' Things, cited by the State in response to the defendant's Motion to Quash and/or Alternatively Motion for Bills of Particulars relative to the new informations and discussed in detail previously in this order, the court finds the information brought against the co-defendant in this case is sufficient. Further, the court finds the State is not attempting to resurrect an issue for appeal that it previously forfeited by drafting the new informations. The State included the emphasized language in the new information to comply with Judge Houran's order granting the defendants' motion to quash, in which Judge Houran concluded that the informations were insufficient by alleging only that the defendants knew the items they allegedly sold or offered for sale are "customarily intended for use" in violation of RSA 318-B, without referring "to the specific intent required by the statute." (Id. at Doc. 27, Order at 5.) Thus, by alleging in the new informations that the items allegedly sold or offered for sale are "used, intended to be used or customarily intended for use" in violation of RSA 318-B, the State cannot be said to have simply charged the defendants with identical informations in order to resurrect an issue for appeal. To the contrary, the State drafted the new informations to include language referring to the specific intent of the purchaser in keeping with Judge Houran's directives.

Accordingly, the defendant's Motion to Dismiss is **DENIED**.

So Ordered.

Date: September 23, 2003

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Peter H. Fauver
Presiding Justice